**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004 | ) | MB Docket No. 05-49 |
| | ) | |
| | ) | |
| Implementation of Section 340 of the Communications Act | ) | |

# JOINT OPPOSITION OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS TO PETITION FOR RECONSIDERATION


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March 2, 2006

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**Summary**

The various objections of DIRECTV and EchoStar ("Petitioners") to the Commission's interpretations of SHVERA's requirements for satellite delivery of significantly viewed signals are without merit. Petitioners take exception to the Commission's objective comparative bit rate approach to the "equivalent bandwidth" requirement and to the Commission's interpretation of the statute's analog service requirement. The Commission's interpretation of SHVERA in each instance gives full and accurate meaning to the statutory requirements, and it promotes and protects localism and local over-the-air broadcast service consistent with congressional intent.

Petitioners contend that the Commission's comparative bit rate approach equates to an "equal bandwidth" requirement. It does not. The Commission expressly observed that SHVERA "precludes 'identical bandwidth,'" and it carefully explained in at least five ways why its comparative bit rate approach is not amount an "equal bandwidth" or "identical bandwidth" requirement.

That Section 340 does not contain the word "objective" does not prevent the Commission from applying objective criteria to the "equivalent bandwidth" requirement. Although, as here, the word "objective" does not appear in Section 119 of the Copyright Act's "unserved household" definition, that section of the statute has nevertheless been held to require an objective standard. In addition, there is no "inconsistency" in the Commission's application of objective criteria and the fact that the *Report and Order* contemplates different bit rates as a consequence of different compression techniques. Furthermore, there is no merit to Petitioners' contention that the Commission has in some way embraced a "subjective" picture quality test.

Petitioners provide no factual support of any kind for their complaint that it is technically too difficult for them to comply with the Commission's implementation of the statute. The Commission

previously considered and rejected this argument, recognizing that to read the "equivalent bandwidth" requirement out of SHVERA, as Petitioners essentially propose, would result in the very type of material discrimination that Congress sought to proscribe. Moreover, equipment and technology already exist to permit satellite carriers to comply with the Commission's comparative bit rate approach as explained in the *Report and Order*.

There is also no merit to Petitioners' objection to the Commission's interpretation of SHVERA requirements that, before a satellite subscriber may receive the analog signal of an out-of-market significantly viewed station affiliated with a particular network, the subscriber must first receive the analog signal of the local station affiliated with that network. The Commission correctly explained in the *Report and Order* how Section 340(b)(1) must be construed together with Sections 340(b)(3) and 340(b)(4) and with the legislative history of SHVERA. Petitioners would have the Commission read and interpret specific provisions of SHVERA in isolation, out of context, and in obvious disregard of other interrelated provisions and the statute's legislative history.

What Petitioners really request is a regulatory-imposed advantage over local stations in retransmission consent negotiations. But the Commission correctly recognized that SHVERA was intended not to enhance the negotiating leverage of either broadcasters or satellite carriers, but rather to protect localism and to prevent satellite carriers from by-passing local stations or using the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms. Petitioners would ascribe to the statute a meaning and result that is completely at odds with the stated will of Congress.

For the reasons set forth herein, NAB and the Network Affiliates respectfully request that the Petition be denied.

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**JOINT OPPOSITION OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS TO PETITION FOR RECONSIDERATION**

The National Association of Broadcasters ("NAB") and the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates") (jointly, "NAB and Network Affiliates"), by their attorneys, hereby jointly oppose the Petition for Reconsideration ("Petition") filed jointly by DIRECTV, Inc. and EchoStar Satellite LLC (collectively, "Petitioners") to the *Report and Order*, FCC 05-187 (Nov. 3, 2005), in the above-referenced proceeding.[1]

Petitioners seek reconsideration of two issues in the Commission's *Report and Order*: (i) the Commission's comparative bit rate approach for determining whether satellite carriers allocate bandwidth for retransmission of local network affiliate stations "equivalent" to the bandwidth

[1] NAB is a nonprofit trade association that advocates on behalf of more than 8300 free, local television and radio broadcast stations and also broadcast networks before Congress, the Commission, and the courts . The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

provided by satellite carriers for retransmission of out-of-market significantly viewed network affiliate stations and (ii) the Commission's finding that SHVERA requires that, before a satellite subscriber may receive the analog signal of an out-of-market significantly viewed station affiliated with a particular network, a subscriber in a market where there is a local affiliate must first receive the analog signal of the local station affiliated with that network. Petitioners' objection in each respect is without merit, and the Petition should, therefore, be denied.

As an initial matter, the Petition should be dismissed for the reason that it does not meet the threshold procedural requirement for reconsideration. It is well-settled that "petitions for reconsideration are not granted for the purpose of debating matters which have already been fully considered and substantively settled."[2] Moreover, Petitioners fail to meet the standards in Section 1.429(b) of the Commission's rules to reopen debate based on new facts. Not only do Petitioners fail to provide sufficient new facts to warrant reconsideration, but they fail to present any new facts that were unknown and could not have been known during the course of the rulemaking proceeding itself. Petitioners were given a full opportunity to present evidence in this proceeding, all relevant matters were fully considered by the Commission, and the Commission made reasonable policy decisions to ensure that the needs of the public and all interested parties were fully taken into account.[3]

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[2] *Regulatory Policy Regarding the Direct Broadcast Satellite Service*, 94 FCC 2d 741 (1983), ¶ 11.

[3] *See id.* at ¶ 12.

## I. The Commission's Comparative Bit Rate Approach Comports with the Letter and Purpose of SHVERA's "Equivalent Bandwidth" Requirement

Petitioners' objection to the Commission's comparative bit rate approach comes down to a three-fold complaint: first, that the Commission is really requiring "equal bandwidth," not merely "equivalent bandwidth"; second, that the Commission should not apply "objective" criteria to "equivalent bandwidth" because the word "objective" does not appear in SHVERA; and third, that satisfying SHVERA's "equivalent bandwidth" requirement is just too hard for Petitioners to do. There is no basis for any of Petitioners' complaints. The statutory interpretation advanced by Petitioners would allow the satellite industry to discriminate against and competitively disadvantage local network affiliate stations in favor of out-of-market stations—a result Congress specifically sought to prevent.

Petitioners' mischaracterization of the comparative bit rate approach as an "equal bandwidth" requirement is belied by the Commission's careful explanation in the *Report and Order*—and by Petitioners' own Petition. The Petition contains not a single example of how the comparative bit rate approach actually imposes an "equal bandwidth" requirement rather than the more supple "equivalent bandwidth" requirement specified in SHVERA.

The Commission expressly concluded that if an out-of-market significantly viewed station broadcasts in high definition and the local station broadcasts only a single standard definition stream, then the satellite carrier may retransmit into the local market the significantly viewed station's high definition stream.[4] That, plainly, is not an "equal bandwidth" requirement.

The Commission expressly concluded that if the significantly viewed station broadcasts

[4] *See Report and Order* at ¶ 95.

several multicast streams and the local station broadcasts only a signal standard definition stream, then the satellite carrier may retransmit all of the significantly viewed station's multicast streams into the local market.[5] That also is not an "equal bandwidth" requirement.

The Commission expressly concluded that SHVERA "precludes 'identical' bandwidth" and recognized that "bandwidth use (or bit rate) will fluctuate from moment to moment."[6] That, too, is not an "equal bandwidth" requirement.

The Commission expressly concluded that a satellite carrier would comply with the "equivalent bandwidth" requirement if it used different compression technology or different modulation technology for the two sets of streams, provided that there was no greater degradation of the local station's stream, even though the bit rates would no longer nominally appear equivalent.[7] That, again, is not an "equal bandwidth" requirement.

The Commission expressly observed that variations in bandwidth, on the order of 5%, satisfy SHVERA's "equivalent bandwidth" requirement and also are consistent with SHVERA's prohibition against "identical bandwidth," even if the peak bit rate of the significantly viewed station's stream exceeds the peak bit rate of the local station's stream.[8] That is not an "equal bandwidth" requirement, either.

In short, Petitioners' claim that the *Report and Order* requires "equal bandwidth," rather than "equivalent bandwidth," is simply unsupportable.

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[5] *See Report and Order* at ¶ 95.

[6] *Report and Order* at ¶ 97.

[7] *See Report and Order* at ¶ 96 & n.269.

[8] *See Report and Order* at ¶ 99 n.278.

Petitioners' complaint about the Commission's application of objective criteria to the "equivalent bandwidth" requirement is equally unsupported. Petitioners suggest that because the word "objective" does not appear in SHVERA, the Commission cannot apply an objective standard. The word "objective" does not appear in Section 119 of the Copyright Act's "unserved household" definition either, but that language has nevertheless (and properly) been held (repeatedly) to require an objective standard.[9] The Commission's reasoning in the *Report and Order* is unassailable:

> The statute expressly measured equivalency in terms of bandwidth, which calls for an objective comparison. . . .
>
> We rest our conclusion on the statute, which speaks in terms of bandwidth, not material discrimination. Therefore, we will require satellite carriers to make an objective comparison, rather than a subjective one based on material discrimination [as DIRECTV proposes].[10]

And, since Congress expressly delegated to the Commission the power to define "equivalent bandwidth," the Commission's interpretation is entitled to considerable weight.[11] Moreover, SHVERA's legislative history clearly shows that Congress intended that satellite carriers not be permitted to discriminate against or to disadvantage local stations in favor of out-of-market stations.[12] Nothing in the legislation itself or its legislative history suggests that Congress did not

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[9] *See, e.g.*, *ABC, Inc. v. PrimeTime 24*, 184 F.3d 348, 352 (4th Cir. 1999).

[10] *Report and Order* at ¶¶ 96, 99.

[11] *See, e.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (stating that where Congress has "expressly delegated" to an agency "the power to prescribe standards" under a provision of a federal statute, Congress "entrusts" to the agency "the primary responsibility for interpreting the statutory term" and that a "reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner").

[12] *See* H.R. REP. 108-634 (2004), at 12 ("Section 340(b)(2)(B) prevents the satellite operator from retransmitting a local affiliate's digital signal in a less robust format than a significantly viewed digital signal of a distant affiliate of the same network, such as by down-converting the local (continued...)

intend for the Commission to employ "objective" criteria to ensure that the non-discrimination principle of the statute is given real force and effect.

Petitioners' allegation that the Commission was "inconsistent" in the *Report and Order*,[13] even if true (which it is not), does not undermine the correctness of the Commission's interpretation that the "equivalent bandwidth" requirement necessitates objective comparison. The example cited by Petitioners themselves illustrates why the Commission's objective comparative bit rate approach is not an "equal bandwidth" requirement. Petitioners state that the *Report and Order* "contemplate[s] that differing bit rates may be used for local and significantly viewed signals," pointing to the Commission's approval of different compression techniques.[14] The fact that the *Report and Order* contemplates differing bit rates does not make comparison of the bit rates any less objective, so there is no force (much less logic) to Petitioners' argument. And the very fact that Petitioners recognize that the Commission sanctioned differing bit rates (in certain circumscribed instances) gives the lie to their argument that the Commission has actually imposed an "equal bandwidth" requirement. One may cite as many dictionaries or mathematical texts as one would like, and "different bit rates" will never be found to mean "equal bit rates."[15]

Petitioners argue that because "the Commission held that it will compare 'picture quality,'" which is a subjective standard, the Commission's comparative bit rate approach is somehow

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[12](...continued)
affiliate's signal but not the distant affiliate's signal from high-definition digital format to analog or standard definition digital format.").

[13] *See* Petition at 5-6.

[14] Petition at 5-6.

[15] *Cf.* Petition at 3-4 (citing various dictionary definitions).

contaminated because that approach is not really objective after all.[16] This argument not only mischaracterizes the *Report and Order* but collapses from its own illogic. The *Report and Order* does not require the Commission to apply a subjective picture quality standard. The Commission said that "[w]e will compare the appropriate bit rate under the circumstances. . . . We will consider whether carriers follow generally accepted engineering practices as well as any other relevant means to compare picture quality."[17] Comparing bit rates, examining engineering practices, and determining relative picture quality as between two pictures are all objective standards. There is no suggestion in the *Report and Order* that the Commission would ever revert to a truly subjective "do you like your picture?" test, with which Petitioners are familiar from the satellite industry's documented abuse of the "unserved household" provision in Section 119 of the Copyright Act.[18] In any event, it is entirely unpersuasive that Petitioners object to the application of an objective standard in favor of a subjective standard on the grounds that the objective standard is, itself, subjective after all.

Finally, Petitioners' complaint that it is just too technically difficult to comply with the Commission's implementation of SHVERA's "equivalent bandwidth" provisions has no factual or record support whatsoever. DIRECTV made this same conclusory argument in the proceeding originally, and the Commission properly rejected it:

> In adopting the comparative bit rate approach, we are aware that DIRECTV claims that such comparisons are technically

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[16] Petition at 6.

[17] *Report and Order* at ¶ 96.

[18] *See, e.g.*, *ABC, Inc. v. PrimeTime 24, Joint Venture*, 17 F. Supp. 2d 467 (M.D.N.C. 1998), *aff'd*, 184 F.3d 348 (4th Cir. 1999); *CBS Broad. Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998).

> infeasible, both because of the difficulties in calculating them and because of the number of signals that must be compared by the carrier. . . . We disagree. Not only would [DIRECTV's approach] be contrary to the statute's language and intent, but we agree with NAB that DIRECTV's proposed interpretation would cause the type of material discrimination that DIRECTV itself argues the statute prohibits because it would allow satellite carriers to carry a significantly viewed station in a more favorable format than that of the local station during different times of the day.[19]

Just as DIRECTV had failed to do in its comments, Petitioners continue to fail to provide any factual support for the claim that it is technically infeasible to apply the Commission's comparative bit rate approach in real time. Petitioners have not presented a single piece of evidence that the equipment and technology necessary to comply with the Commission's implementation of SHVERA do not exist.[20] This evidentiary failure alone demonstrates why the Petition cannot satisfy the threshold requirements of Section 1.429(b) of the Commission's rules.

The reason why the Petition fails to present factual evidence in support of its technical infeasibility claim is because there is no such evidence. A broadcast station's digital signal contains PSIP information that tells the reception equipment how many program streams are being carried in the digital signal, and the video resolution (i.e., standard definition or high definition) is carried in the Sequence Header of the MPEG-2 video data. Therefore, a satellite carrier's statistical multiplexing equipment can dynamically determine in real time whether the local station's signal—as well as the distant station's signal—is high definition or standard definition and

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[19] *Report and Order* at ¶ 98.

[20] *Cf. Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd 14242 (2005), at ¶ 21 (finding "speculative" DIRECTV's claims as to the "burdensomeness" of the Commission's multicast and high-definition carriage requirements in the states of Alaska and Hawaii).

comprised of one or more streams. Encoders, designed specifically for use by satellite carriers, are currently available that seamlessly allow the statmuxing of high definition and standard definition transport streams in the same pool. An example of such an encoder is Harmonic's DiviCom MV 3500 Multi-Codec High Definition Encoder. Harmonic states that the encoder was

> [d]esigned primarily with the needs of satellite and telco service providers in mind . . . allow[ing] direct-to-home satellite operators to quickly and efficiently launch new HD services, combining several MPEG-4 HD channels in a single statistical multiplex. Grouping channels for a given market together can provide significant satellite capacity savings. . . .
>
> HD/SD statistical multiplexing—The MV 3500 can be included in a VBR [variable bit rate] statistical multiplex using either DiviTrackXE or DiviTrackIP, the industry's first statistical multiplexing solution that supports the dynamic participation of HD video, SD video, and data in a single pool . . . .[21]

Harmonic's DiviTrackXE statistical multiplexing technology allows the operator to set minimum and maximum bit rates, the average rate required, and a time period over which the average rate is to be calculated. Moreover, the technology includes intelligent priority control:

> Thus the user can assign a priority attribute to each channel in the DiviTrackXE pool. When the complexity increases beyond a normal mid point that is based on a long-term running average so that the system can detect when quality is starting to suffer. At this point, the system will start to engage a quality bias mechanism that activates to re-distribute bits in the pool so that more are directed to the most favored channels. The next level of extra allocation will be a function of the priority attribute that has been set for each video program.[22]

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[21] DiviCom MV 3500 Data Sheet, *available at* http://www.harmonicinc.com/stageone/files/harmonic/collateral/MV3500%5Fv05%2D08%5FRS%2Epdf (visited Feb. 17, 2006).

[22] DiviTrackXE—Advanced Statistical Multiplexing White Paper at 5, *available at* http://www.harmonicinc.com/stageone/files/harmonic/collateral/DiviTrackXE%5FWP%5F022503%2Epdf (visited Feb. 17, 2006).

In short, the very equipment and technology necessary to implement the Commission's comparative bit rate approach as explained in the *Report and Order* are available from at least one vendor and may also be available from others as well. In fact, DIRECTV is a Harmonic customer and utilizes DiviTrackXE and other statistical multiplexing equipment and technology from Harmonic.[23]

Significantly, DIRECTV and EchoStar fail to disclose that they are utilizing this significantly viewed compulsory license (despite its existence for well more than a year) in only a handful of markets for analog signals and, at this point, to our knowledge, in no markets for digital signals. For that matter, large cable MSOs are increasingly refusing to retransmit out-of-market digital signals into significantly viewed areas. Therefore, in practical reality, there are likely to be no more than a few dozen significantly viewed digital signals and local digital signals that a satellite carrier will want and need to monitor for competitive offering purposes, not the "hundreds" that Petitioners claim.[24] Thus, it is neither "technically infeasible" nor a "practical impossibility"[25] for Petitioners to comply with the *Report and Order* as issued.

In sum, the Commission should deny the Petition and reject Petitioners' subjective "material discrimination" approach. As the Commission stated in the *Report and Order*, Petitioners' approach would "allow satellite carriers to carry a significantly viewed station in a more favorable format than

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[23] *See Press Release*, DIRECTV Selects Harmonic's Industry-Leading MPEG-4 AVC Digital Video Solutions (dated Feb. 6, 2006), *available at* http://www.harmonicinc.com/ah_press_release_text.cfm?ID=591 (visited Feb. 20, 2006).

[24] Petition at 7.

[25] Petition at 7.

that of the local station during different times of the day," which is "contrary to the statute's language and intent."[26]

## II. The Commission's Rules Correctly and Appropriately Implement the Analog Service Requirement of Section 340(b)(1)

Petitioners base their challenge to the Commission's analog service requirement in Section 340(b)(1) on the argument that the statute uses the indefinite article "a" and therefore "must be presumed to be an intentional act by Congress to require only local-into-local analog service generally as precondition to distant-into-local analog service."[27] The Commission previously considered and properly rejected this argument. Petitioners offer no new facts or evidence of any kind in this regard.

In a text-book exposition of statutory construction, the Commission explained how Section 340(b)(1) should be construed together with Sections 340(b)(3) and 340(b)(4) and how the legislative history of SHVERA supported its reading of the law, including the legislative history of Section 340(b)(2)(A) containing the digital service requirement.[28] The Commission's construction of the statutory scheme reflects accurately the statute's underlying principle to preserve localism and local broadcast service.

Petitioners also argue that because the language of the analog and digital service requirements differ, Congress could not have intended the interpretation of the analog service

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[26] *Report and Order* at ¶ 98.

[27] Petition at 9-10.

[28] *Report and Order* at ¶¶ 71-72.

requirement that the Commission places upon it.[29] This argument mistakenly elevates just one general presumption of statutory construction over other canons of statutory construction that also must be given due consideration and weight. As the Supreme Court has explained:

> It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole," *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). . . . In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision . . . to an administrative agency. *Cf. MCI Telecommuns. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994).[30]

This is precisely what the Commission did. It has read Section 340(b) in context and has fit it into a symmetrical, coherent, and harmonious whole.

Moreover, Petitioners' expression-exclusion argument has been rejected by the Supreme Court when contextual evidence points to the contrary.[31] "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[32] The textual and contextual evidence of Sections 340(b)(3) and 340(b)(4),

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[29] *See* Petition at 10.

[30] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

[31] *See United States v. Vonn*, 525 U.S. 55, 65 (2002) (stating that the expression-exclusion canon "is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusions of its common relatives").

[32] *Burns v. United States*, 501 U.S. 129, 136 (1991).

together with the purpose of the statute to protect localism, as shown by the legislative history,[33] demonstrate that the Commission has properly interpreted Section 340(b)(1) to require that, before a satellite subscriber may receive the signal of an out-of-market significantly viewed station affiliated with a particular network, the subscriber must first receive the signal of the local station affiliated with that network.

Finally, Petitioners argue for an interpretation of SHVERA that "permits satellite operators to carry significantly viewed network signals notwithstanding a local network affiliate[']s refusal to grant retransmission consent."[34] But SHVERA plainly does not create exceptions for failure of the local affiliate and the satellite carrier to reach a retransmission consent agreement or otherwise, and, indeed, SHVERA did not contain any amendment to Section 338 in this respect. The Commission, as it obviously recognized, cannot read such an exception into the statute.[35] The purpose of the provision, as the Commission also correctly recognized, is to protect localism and to prevent satellite carriers from by-passing local stations or using the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms. Petitioners request a regulatory-imposed negotiating advantage by attempting to ascribe to the statute a meaning and result plainly at odds with the stated will of Congress. DIRECTV and EchoStar are, in essence, asking the Commission to do precisely what Congress declined to do—which is to sanction discrimination against local stations in favor of out-of-market stations.

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[33] *See* H.R. REP. 108-634, at 12 (explaining that Sections 340(b)(1) and 340(b)(2)(A) were intended "to protect and promote localism").

[34] Petition at 11.

[35] As the Supreme Court has "often" stated, "only Congress can rewrite [a] statute." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986).

## Conclusion

For the reasons set forth above, NAB and the Network Affiliates respectfully request that the Petition be denied.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BROADCASTERS**
**AND THE**
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March 2, 2006

## Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Joint Opposition of the National Association of Broadcasters and of the ABC, CBS, FBC, and NBC Television Affiliate Associations to Petition for Reconsideration** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

Susan Eid
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DIRECTV, Inc.
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This the 2nd day of March, 2006.

/s/
Sandra S. Kreps